

Federal Court



Cour fédérale

Date: 20100622

Docket: IMM-5509-09

Citation: 2010 FC 678

Montréal, Quebec, June 22, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**BEATRIZ LANDIN BANDA
KIARA MARIEL ARENAS LANDIN
ARIEL ALEXANDRA ARENAS LANDIN**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The main issue in this application for judicial review is whether Ms. Landin Banda and her daughters were given a fair chance to make their submissions in support of their refugee claim in Canada. The Immigration and Refugee Board's Refugee Protection Division dismissed their claim on the ground that it was not credible. The claim was largely based on the risks to which Ms. Landin

Bandin's spouse, Ariel Arenas Pareja, would be exposed. He testified on their behalf on the first day of the hearing, but since he had not finished his testimony at the end of that day, he was to appear at a later date to finish his testimony. Mr. Arenas Pareja did not appear on that date because, in the interim, an order for his removal to Mexico had been issued against him and he had gone into hiding. In light of the fact that he had received a summons, the applicants submit that officers of the Canada Border Services Agency violated not only the *Immigration and Refugee Protection Act*, but also the principles of natural justice by placing Mr. Arenas Pareja in an impossible position whereby he would be unable to finish his testimony on behalf of his spouse and daughters.

[2] Had he not claimed refugee protection in 1990, his most recent claim, as well as that of his spouse and daughters, would have been treated far differently.

[3] Mr. Arenas Pareja's original refugee claim, which is not related to the applicants' current claim, was unsuccessful and so he returned to Mexico in 1991. He came back to Canada in 2007, accompanied by his spouse and their daughters, and again claimed refugee protection. However, his claim was ineligible to be referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), because section 101 of the *Immigration and Refugee Protection Act* renders such a claim ineligible if the person has had a prior claim rejected. He was, however, entitled to a pre-removal risk assessment and he availed himself of this right. This assessment turned out to be negative and preparations were made to proceed with his removal. He did not show up at the airport, and went into hiding. A warrant for his arrest was issued.

[4] Mr. Arenas Pareja claims that, as a former police officer who specialized in drug enforcement and who more recently worked as a private detective helping police with various investigations, he is personally targeted by drug traffickers and corrupt police officers. The negative PRRA decision was issued in early 2008. He was granted a stay of removal while awaiting the decision on his application for leave and judicial review. Leave was granted but the application for judicial review was dismissed on the merits by Deputy Judge Lagacé in December 2008 (2008 FC 1333).

[5] Deputy Judge Lagacé found no reason to set aside the decision of the PRRA officer, who had determined that Mr. Arenas Pareja had not established that he was in danger and, more specifically, that he was personally targeted by drug traffickers or corrupt police officers. She had also determined that he had failed to rebut the presumption that state protection was available to him in Mexico.

[6] The following month, the Immigration and Refugee Board issued, at Ms. Landin Banda's request, a summons ordering Mr. Arenas Pareja to appear at the hearing of her case, for which a date had not yet been set. Given that he, in actual fact, wanted to testify on his spouse's behalf, the real purpose of the request for the summons was to keep him in Canada, at least until he had finished giving his testimony.

[7] Mr. Arenas Pareja testified on the first day of Ms. Landin Banda's hearing on March 10, 2009. He then received an order to appear at the Montréal airport on March 14 for his removal. He

filed an application for leave and judicial review of the decision to remove him while he was still under a summons and applied for a stay of removal while awaiting the decision on that application. The application for a stay was dismissed (Docket No. IMM-1342-09). As was previously mentioned, he failed to appear at the airport and subsequently went into hiding.

[8] Ms. Landin Banda testified on the second day of the hearing on May 27, 2009. In addition to the risks faced by her husband, she also testified that she and one of her daughters had been kidnapped in 2007, and that she herself had been raped. The panel expressed serious doubts about this part of the testimony, given that this incident had not been mentioned in the Personal Information Form (PIF) she had previously submitted in support of her claim.

[9] There was a long discussion between her counsel and the panel member regarding the legality of the Minister's decision not to postpone Mr. Arenas Pareja's removal, given that he had not finished his testimony and was still under a summons. The panel carefully avoided addressing the issue and simply stated that the matter was before the courts and that justice would run its course. Counsel for Ms. Landin Banda stated that her spouse was in Canada. The panel suggested hearing the rest of his testimony via teleconference, but no agreement could be reached. However, an arrangement was made whereby Mr. Arenas Pareja would be allowed to finish his testimony by affidavit, which is what he did.

[10] One of the panel's main concerns was that, in spite of the plethora of documents submitted by Mr. Arenas Pareja, most of which were in Spanish and had not been translated, he had not

submitted a single piece of evidence corroborating his affiliation with the police after 1997 and was therefore unable to demonstrate the personalized risk he claimed he would be subject to if he returned to Mexico.

[11] In a subsequent affidavit, he indicated that, given the climate of fear that prevailed in Mexico, it was difficult for him to obtain corroborating evidence, even though he had previously stated that there was a great deal of evidence available in Mexico City.

DECISION UNDER REVIEW

[12] Ms. Landin Banda's claim on behalf of herself and her daughters was dismissed for lack of credibility. The panel did not believe that the Mexican authorities would use the services of private detectives in fighting the drug cartels. At any rate, no corroborating evidence was provided, in spite of the many opportunities Mr. Arenas Pareja had been given to do so.

[13] Furthermore, given that Ms. Landin Banda had not mentioned her kidnapping and rape in her PIF, the panel was of the view that she was not credible.

DISCUSSION

[14] The applicants argued that the panel failed to properly consider the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution. Even if Ms. Landin Banda was reluctant to discuss her rape with her spouse, the panel saw no reason that would justify the fact that the kidnapping had not been mentioned. I am of the same view.

[15] Mr. Arenas Pareja had over two years to provide evidence in support of his claims that he was targeted by drug cartels and corrupt police officers. Country conditions certainly indicate that an honest police officer involved in narcotics investigations could very well be targeted. However, there is nothing in the record which would suggest, in any meaningful way, that Mr. Arenas Pareja is personally at risk.

[16] While the panel's reluctance in believing that the police would hire private investigators could, if it was perceived as an offhand remark, be taken as pure speculation, it is tempered by Mr. Arenas Pareja's inability to provide evidence in support of his claims, despite his being asked to do so by the panel on several occasions.

[17] Therefore, the panel's credibility findings are not unreasonable.

[18] It is important to remember that Mr. Arenas Pareja's PRRA application was not rejected for lack of credibility, but rather for lack of evidence and because of the availability of state protection.

However, even if he himself had been found not to be credible, this does not mean that he would not have been believed at his spouse's hearing. Each case stands alone (*Huziak v. Andrychuk* (1977), 1 C.R. (3d) 132 (Sask. Q.B.)).

[19] The next issue is to determine if Ms. Landin Banda was denied a fair hearing. If such is the case, the decision must be set aside, as this Court should not speculate on what might have happened if Mr. Arenas Pareja had been able to finish his testimony before the panel (*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643).

[20] A decision on the merits in an application for judicial review is final, with no right of appeal, unless the Court certifies a serious question of general importance.

[21] Ms. Landin Banda proposes the following three questions:

[TRANSLATION]

- a. Is the Canada Border Services Agency required to respect the summonses that are issued by the Immigration and Refugee Board pursuant to the right to a fair hearing and section 7 of the *Canadian Charter of Rights and Freedoms*?
- b. Does section 50 of the *Immigration and Refugee Protection Act* require that this summons be respected?
- c. Does natural justice require that the removals officer respect such a summons regardless of the exact wording section 50 of the Act?

[22] Section 50 of the IRPA reads as follows:

<p>50. A removal order is stayed</p> <p>(a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order;</p>	<p>50. Il y a sursis de la mesure de renvoi dans les cas suivants :</p> <p>a) une décision judiciaire a pour effet direct d'en empêcher l'exécution, le ministre ayant toutefois le droit de présenter ses observations à l'instance;</p>
---	--

[23] It is important to keep in mind that this is Ms. Landin Banda's application for judicial review of her refugee protection claim, and not that of her spouse. The issue is whether she was denied a fair hearing, and not whether Mr. Arenas Pareja ought to have been deported while he was under a summons. He requested a postponement; Deputy Judge Teitelbaum refused to grant a stay, and his application for leave was dismissed by Justice Martineau. There is no right of appeal from these decisions. Essentially, Ms. Landin Banda is trying to challenge these decisions indirectly, which is not something this Court can accept (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77).

[24] The panel has a great deal of latitude, greater than that of this Court, in the manner in which it receives evidence. Furthermore, even this Court regularly proceeds by teleconference, and our rules permit evidence by way of affidavit. Mr. Arenas Pareja's affidavit, submitted after the first hearing, was received and considered.

[25] Given the circumstances, and the fact that the panel did have the opportunity of meeting face to face with Mr. Arenas Pareja, that he took the law into his own hands by failing to report for his removal to Mexico, and that in his subsequent affidavit he admitted his inability to corroborate his allegations, Ms. Landin Banda's hearing was fair.

[26] Consequently, it is both unnecessary and inappropriate for this Court to comment upon or to certify the proposed questions.

ORDER

THE COURT ORDERS that:

1. The application for judicial review is dismissed.
2. There is no serious question of general importance to certify.

“Sean Harrington”

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5509-09

STYLE OF CAUSE: Landin Banda et al v. MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 18, 2010

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: June 22, 2010

APPEARANCES:

Stewart Istvanffy FOR THE APPLICANTS

Michèle Joubert FOR THE RESPONDENT

SOLICITORS OF RECORD:

Études légale Stewart Istvanffy FOR THE APPLICANTS
Montréal, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec